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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 310

PEERLESS INSURANCE COMPANY,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent,

—and—

SAM ACCARDI, *et al.*,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Peerless Insurance Company, prays that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals for the Second Circuit, entered on April 27, 1965, upon the decision rendered on April 6, 1965, affirming the order of the U. S. District Court for the Southern District of New York, entered on November 20, 1964.

Opinion Below

The opinion of the District Court filed November 20, 1964, is unreported and is printed as Appendix A to this petition. The opinion of the Court of Appeals is reported

at 343 F. 2d 759 and is printed as Appendix B to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Did the lower Courts err in their interpretation of Rule 46 of Federal Rules of Criminal Procedure that a bail bond company's failure to obtain adequate collateral security for its obligation bars it from obtaining a remission, in whole or in part, of the bail bond forfeiture?

Statute Involved

Rule 46 of the Federal Rules of Criminal Procedure (18 U. S. C.) provides in pertinent part:

"*Rule 46. Bail*

"(f) *Forfeiture.*

"(1) *Declaration.* If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

"(2) *Setting Aside.* The Court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

* * *

"(4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision."

Statement of Case

Petitioner, Peerless Insurance Company (hereafter "Peerless"), is in the business of writing bail bonds, among other things.

On August 19, 1955, Sam Accardi, one of the defendants in the above action was arraigned in the U. S. District Court, Southern District of New York, on an indictment charging conspiracy to violate the laws relating to the sale and distribution of narcotics. He pleaded not guilty; bail was fixed at $75,000; and trial was set for September 28, 1955. Peerless thereupon executed and filed its undertaking in the amount of $75,000. as bond for Accardi's bail. On September 28, 1955, Accardi failed to appear and the bail bond was declared forfeited by District Judge Irving R. Kaufman. On October 7, 1955 Peerless paid to the Government $75,000. in full payment of the forfeiture.

Immediately after forfeiture, Peerless commenced steps to locate and apprehend Accardi. The ceaseless efforts of Peerless are set forth in detail in the affidavit of Frederick J. Miles, its vice president, which was submitted to the Courts below. The district Judge, in his opinion, acknowledged that "the bonding company exerted efforts to locate the defendant and have him returned to this district" (App. p. 2a) and "Efforts made by the bonding company in the intervening years were costly" (App. p. 2a).

Finally on April 2, 1963, Accardi was arrested in Italy, extradited and brought back to trial in the Southern District of New York under the original indictment. He was convicted on July 20, 1964 following a jury trial and was sentenced on August 24, 1964 to a term of 15 years which he is presently serving.

At the time the bail bond was executed, Peerless demanded and obtained as collateral security, three mortgages on real estate owned by Accardi and his wife, having an appraised value in excess of $90,000. Peerless also obtained a confession of judgment from both of them which would be entered in the event of a forfeiture. After the forfeiture Peerless immediately entered the judgment on the confession, and thereby obtained a lien against two other pieces of real property owned by Accardi and his wife.

Thus, Peerless believed that it was more than adequately protected against the default of Accardi. Unfortunately, it developed later that all of said real property had prior encumbrances thereon, consisting primarily of tax liens and other claims of the U. S. Government. Accordingly, when Peerless resorted to the collateral security, after Accardi's default, Peerless realized a net of only $15,000.00 thus sustaining a loss of $60,000.00.

When Accardi was later apprehended, tried and convicted, Peerless made application to the district court for an order setting aside the forfeiture and remitting a portion of the $75,000 pursuant to Rule 46, of the F. R. Crim. P. on the grounds that: Peerless was an innocent third party; it had cooperated fully with the government; it had exerted diligent efforts and incurred substantial expenses to effect the apprehension of Accardi; Accardi was apprehended, tried and convicted; therefore, "justice does not require the enforcement of the forfeiture."

The district court denied the application of Peerless for a partial remission of the $75,000. and such order was affirmed by the Court of Appeals.

Reasons for Granting the Writ

The order of the district court as affirmed by the Court of Appeals has erroneously determined, in effect, that the benefit and remedies of Rule 46 of the F. R. Crim. P. are not available to bail bonding companies. Such conclusion is the only logical one that can be drawn from the opinion which states that since Peerless did not obtain sufficient collateral before posting the bail bond, it was thereby negligent and will not be granted any relief by the Court. Inasmuch as a bonding company will only seek relief from a forfeiture when the security proves inadequate, it follows from the opinion of the Court below that the bonding companies can never be given relief under Rule 46 no matter how great their loss and no matter how innocent and meritorious their application.

We respectfully submit that this Court should correct such erroneous construction of the Rule.

I.

The lower courts erroneously interpreted Rule 46 in holding that the benefits are not available to petitioner.

Rule 46, as set out above, became effective in its present form in 1946. Prior to such time if a bail bond was declared forfeited by reason of the *wilful* default of a defendant, the district court had no power to set aside such forfeiture. But in 1946 this Court, in its wisdom, saw fit to amend the rule so as to provide for the remission of a bail bond forfeiture, even though there be a wilful default, "if it appears that justice does not require the enforcement of the forfeiture."

The Notes of the Advisory Committee on Criminal Rules contain the following explanatory statement (18 U.S.C.A.):

> "Subdivision (f) (2) changes existing law in that it increases the discretion of the court to set aside a forfeiture. The power of the court under 18 U.S.C.A. former §601 was limited to cases in which the defendant's default had not been wilful."

The Rule gives the Court power to impose such terms and conditions which it deems appropriate (*United States* v. *Public Service Mutual Ins. Co.*, 282 F. 2d 771 [2d Cir. 1960]; *United States* v. *Davis*, 202 F. 2d 621 [7th Cir. 1953]).

In exercising its discretion the Courts below should have borne in mind the purpose of the bail bond as stated in *Dudley* v. *United States*, 242 F. 2d 656 (5th Cir. 1957) at page 658:

> "The purpose of a bail bond is not punitive. It is to secure the presence and attendance of a defendant to answer the charges against him and to respond to the judgment of the Court, and at the same time to afford the defendant freedom from harassment and confinement before he has been proven guilty of the offense.
>
> • • •
>
> "The object of a recognizance in short is not to enrich the treasury or punish the defendant."

In *Smaldone* v. *United States*, 211 F. 2d 161 (10th Cir. 1954) at page 163 the Court defined the term "discretion" as follows:

> "(T)he term discretion when used as a guide to judicial action means sound discretion, not discretion exercised arbitrarily but with due regard for that which is right and equitable under the circumstances. It means dis-

cretion directed by reason and conscience to a just result."

Surely, if the purpose of a bail bond is not to punish the defendant (see *Dudley supra*), then a "just result" requires that a bonding company also not be punished.

Nowhere in Rule 46 (f) is there any indication that the remedial provisions are not available to the bonding company, nor would such an interpretation be reasonable. The bonding company is generally an innocent party; it has not broken the law; it has not fled the jurisdiction of the Court; it has not flouted the order of the Court to appear for trial; it has done no wrong whatsoever. Yet, under the interpretation of the Courts below Rule 46 was amended by this Court for the sole purpose of helping the wilfully defaulting defendant and with no intent to give any relief to bail bond companies. We respectfully submit that such an interpretation constitutes a misconstruction of Rule 46 (f) which should be corrected by this Court.

The instant case is an example of the injustice which will result from the lower Courts' erroneous interpretation of the Rule. The amount of the bail bond forfeited is $75,000. Foreclosure of the collateral brought a net of $15.000. Therefore, the bonding company has suffered a loss of $60,000. We readily concede that the government should be reimbursed for any expenses incurred by it in its efforts to apprehend Accardi. While the government offered no evidence whatsoever as to the costs incurred by it, such costs were certainly less than $25,000, thus warranting a remission of at least $50,000.

We respectfully submit that the exhaustive efforts of the petitioner bonding company to locate and apprehend the defendant merited the favorable consideration of the Courts below and of this Court. It would constitute an

inducement for bonding companies to make similar efforts in the future. On the other hand, if because of inadequate collateral security, no consideration is to be given to the bonding company for any efforts to locate and apprehend the fleeing defendant, then there is absolutely no motive or inducement for a bonding company to aid in the attempt to apprehend a fleeing defendant.

It should be remembered that Peerless' loss of $60,000 was not occasioned by any deliberate act on its part. It reasonably believed that it was fully protected when it obtained, as security, mortgages in excess of $90,000 plus the confession of judgment. And in fact such security did have a gross value in excess of $90,000, but because of substantial Government liens, of which Peerless was not aware, the realizable net value was reduced to $15,000.

Moreover, if the Courts are to carry out the principle enunciated in the *Dudley* case *supra,* that the defendant is to be afforded freedom until proven guilty, it is mandatory that those furnishing bail bonds be given due consideration. If the bonding companies are to be held strictly accountable unless they obtain adequate security then the purpose of fixing bail will be frustrated by reason of the refusal of bail bondsmen to take such risks. It may very well be that the Court had such problem in mind when it amended Rule 46 and that such amendment was made for the specific purpose of encouraging bail bondsmen to execute more bail bonds with the confident knowledge that a forfeiture would be remitted if "justice did not require the enforcement of the forfeiture."

But, whatever this Court's reason for amending Rule 46 it is manifestly an improper interpretation thereof to hold that the benefits are not available to bonding companies.

CONCLUSION

For the foregoing reasons petitioner respectfully requests that this Court grant the within petition for a writ of certiorari.

Respectfully submitted,

MORRIS K. SIEGEL
Attorney for Petitioner

VINCENT J. CROWE
MURRAY BRENSILBER
Of Counsel

June 24, 1965.

APPENDIX A

Opinion of District Court dated November 20, 1964

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CR 148-93

UNITED STATES OF AMERICA,

—against—

SAM ACCARDI,

Defendant.

CANNELLA, *J.*

Motion by Peerless Insurance Company, pursuant Rule 46(f) of the Federal Rules of Criminal Procedure for an order setting aside the forfeiture and remitting the penalty under such forfeiture of a bail bond filed in the above named action on August 18, 1955 and declared forfeited by order dated September 28, 1955, is denied.

The defendant, Accardi, was arraigned in the above entitled action on August 18, 1955. The indictment concerned certain narcotics violations in violation of Title 21, Sections 173 and 174, U.S.C. and Title 26, Sections 4704(a), 4701, 4703, 4771(a) and 7237(a), U.S.C. The defendant pleaded not guilty and bond in the sum of $75,000 was set on August 18, 1955, which was posted on the same day. The defendant was to appear in court on September 28, 1955 for trial. On that date, the defendant failed to appear and bond was forfeited. On October 7, 1955, the bonding

company paid the $75,000 as required in the undertaking. On April 2, 1963, the defendant was arrested in Italy pursuant to a Presidential warrant and over his objection he was extradited and tried. The defendant was convicted on July 20, 1964 following a jury trial and was sentenced on August 24, 1964 to a term of fifteen (15) years which he is presently appealing.

In the interval between September 28, 1955 and April 2, 1963, both the government and the bonding company exerted efforts to locate the defendant and have him returned to this district. The bonding company, in writing the bond, did so with great dispatch and with great reliance on the defendant's word. This proved to be misplaced because although the defendant claimed that the collateral posted was worth $90,000, in fact the net result to the company was about $15,000. Efforts made by the bonding company in the intervening years were costly. Equally so were the efforts made by the government to locate the defendant and subsequently have him extradited.

The elementary purpose of a bond is to insure the defendant's appearance at the time of trial. Dudley v. United States, 242 F.2d 656 (1957). A fine balance must be observed by the judge who fixes bail. The bail must not be onerous but it must be sufficient to insure the defendant's presence. The insurance company argues here that it is an innocent person and it should not be made to suffer for the willful acts of another. The bail set by the court was not $75,000 less whatever moneys the bonding company could realize on this kind of an application. If this were so, the company would be setting the amount of bail and the court's function would be superseded.

Appendix A
Opinion of District Court dated November 20, 1964

The court has made no appraisal of the costs which the government sustained, but there is no doubt that the amount is subtantial and that the total amount expended involves items not readily calculable. The bonding company should not be permitted to benefit from their apparent careless conduct in accepting the defendant's unsubstantiated word concerning the value of the posted collateral.

The remission of a forfeiture is a matter of judicial discretion. Larson v. United States, 296 F.2d 167 (1961). The test under Rule 46(f) is that the forfeiture may be set aside "if it appears that justice does not require the enforcement of the forfeiture." The burden of proof is clearly on the company to establish that such action by the court is required by the "justice" in the particular case. The court finds that the bonding company has failed to meet its burden. See United States v. Ciena, 195 F.Supp. 511 (S.D.N.Y. 1961).

So ordered.

Dated: New York, New York
November 20, 1964.

JOHN M. CANNELLA
U.S.D.J.

APPENDIX B

Opinion of Court of Appeals dated April 6, 1965

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 433—September Term, 1964.

(Argued April 6, 1965 Decided April 6, 1965.)

Docket No. 29406

UNITED STATES OF AMERICA,

Appellee,

—v.—

PEERLESS INSURANCE CO.,

Appellant.

Before:

WATERMAN, FRIENDLY and ANDERSON,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Cannella, *J.*, denying appellant's motion to set aside a forfeiture of bail.

PETER FLEMING, JR., Asst. United States Attorney (Robert M. Morgenthau, United States Attorney), *for Appellee.*

Appendix B
Opinion of Court of Appeals dated April 6, 1965

SIEGEL & CROWE (Morris K. Siegel, of counsel; Vincent J. Crowe, Murray Brensilber, on the brief), New York City, *for Appellant*.

PER CURIAM:

Appellant posted bail in the amount of $75,000 as security for the appearance of one Sam Accardi to answer to an indictment filed in the United States District Court for the Southern District of New York on August 15, 1955, to which Accardi pleaded not guilty. When Accardi's case was called on the calendar he failed to appear, and on September 28, 1955 the bail was forfeited. Accardi, a fugitive from justice, was apprehended on April 13, 1963, was convicted on July 20, 1964, and is now imprisoned.

On September 1, 1964 appellant moved below, pursuant to Rule 46(f)(2) Fed. R. Crim. P., to set aside the forfeiture of bail subject to whatever conditions the court below might care to impose. The motion was denied, and appellant seeks reversal of that order on the ground that the district judge abused his discretion. We affirm in open court and do so on the memorandum opinion filed by the district judge.

APPENDIX C

Judgment of Affirmance dated April 6, 1965

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of April one thousand nine-hundred and sixty-five.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAM ACCARDI, *et al.*,

Defendants,

PEERLESS INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix C

Judgment of Affirmance dated April 6, 1965

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

A true copy,

A. DANIEL FUSARO
Clerk

Judgment entered 4/27/65

JAMES E. VALECHE
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 310

PEERLESS INSURANCE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 343 F. 2d 759. The opinion of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1965. The petition for a writ of certiorari was filed on July 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion in refusing to set aside the forfeiture of a bond executed by petitioner as surety.

RULE INVOLVED

Rule 46(f), F.R.Crim.P., provides as follows:

> (1) *Declaration.* If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.
>
> (2) *Setting Aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.
>
> (3) *Enforcement.* When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.
>
> (4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Second Circuit affirming the district court's denial of its motion to set aside the forfeiture of a bail bond of $75,000 which it had executed for the defendant in the case of *United States* v. *Accardi*, in the Southern District of New York.

Accardi had been arrested on an indictment charging conspiracy to sell and distribute narcotics. He failed to appear on September 28, 1955, the trial date, and his bond was forfeited. In April, 1963, he was arrested on a presidential warrant in Italy and returned to the United States. He was subsequently convicted and sentenced to imprisonment for fifteen years.

Petitioner's motion for remission of forfeiture alleged that it had expended considerable effort in aiding the apprehension of Accardi and that the rights of the government had not been prejudiced because of Accardi's default. The affidavit of petitioner's vice president in support of the motion expressed the belief that the issuance of the presidential warrant was due in no small part to the efforts of petitioner which were detailed (R. 1-12). The affidavit further stated that at the time the bond was executed, Accardi gave petitioner mortgages on three pieces of real estate and a confession of judgment. Following the forfeiture, petitioner learned that all of Accardi's property was encumbered by substantial mortgages and government liens which were prior to petitioner's lien. Although petitioner had been assured that

Accardi's equity was worth at least $90,000, it sold its interest at public sale for $22,500. The expenses of sale and the expenses of the investigation and efforts to extradite Accardi reduced this amount to approximately $15,000 net (R. 12-14).

The government submitted the affidavit of assistant United States attorney Peter Fleming. It recited the circumstances of Accardi's arrest, flight, and forfeiture of his bond, as set forth above. It stated that between September 19 and 28, 1955, Accardi realized approximately $32,000 from the liquidation of personal assets, followed by his flight to Italy. After he was located in Italy by Interpol, his return to this country required lengthy diplomatic negotiations, because there is no extradition treaty between the two countries covering narcotics offenses. Petitioner played no part in these negotiations and neither located Accardi nor produced him for trial (R. 28-30).

Accardi's flight necessitated substantial financial outlay on the government's part for fugitive investigations in Italy, surveillance after he was located, and diplomatic negotiations which ultimately led to his return to this country. During the time of Accardi's sojourn in Italy, according to the government's information, he was a major source of supply to the heroin trade in this country, resulting in additional expense of undetermined amount to the government.

ARGUMENT

There was obvious basis for the court's exercise of discretion in its denial of this motion. There is no indication in the opinion of the trial court, as petitioner suggests, that it was denied relief because it is a corporate bonding concern. Petitioner's liability is not based upon active misconduct on its part, but upon its contractual liability to insure against the misconduct of the person charged. *Fidelity and Deposit Co. of Maryland* v. *United States*, 47 F.2d 222 (C.A. 9). Willful breach of the obligation of the bond by the principal obligor is not measured by monetary loss to the government, nor is the fault corrected by the circumstance of subsequent apprehension and conviction. However even if these factors were relevant, it is evident that the costs to the government were substantial and that the total amount expended involved items not readily calculable (see Pet. App. 3a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JULY 1965

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